

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

LEE BOYD MALVO,

Defendant.

Criminal No. 102888

**DEFENDANT MALVO'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE REGARDING
THE ADMISSIBILITY OF CRIME SCENE AND AUTOPSY PHOTOGRAPHS**

The Defendant, Lee Boyd Malvo, by his counsel, previously filed a Motion requesting that the Court exclude for use in evidence by the prosecution certain photographs of the victim(s) of the subject crime(s) that were taken at the crime scene(s) and during the victims' autopsy. As a supplement to the points included therein, Defendant hereby states as follows:

"The admissibility of photographs depicting the body of a murder victim is a matter within the sound discretion of the trial court." Boggs v. Commonwealth, 229 Va. 501, 518, 331 S. E. 2d 407, 419 (1985) (quoting Jones v. Commonwealth, 228 Va. 427, 450, 323 S.E.2d 554, 566-67 (1984). The court is within its discretionary boundaries in admitting such photographs if they are "relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime". Stockton v. Commonwealth, 227 Va. 124, 144, 314 S. Ed. 2d 371, 384 (1984). "If a photograph accurately portrays the scene created by a criminal in the commission of the offense on trial, it is not rendered inadmissible merely because it is 'gruesome' and shocking." Washington v. Commonwealth, 228 Va. 535, 551, 323 S.E.2d 577, 588 (1984).

The court must therefore determine whether or not the photographs in question are relevant under the above-described standard and then -- as with all relevant yet prejudicial evidence -- whether their prejudice is outweighed by their probative value. Defendant submits that certain photographs of the crime scenes implicated in this case as well as autopsy photographs are not relevant to any of the enumerated points and are regardless, more prejudicial than probative as to any material issue.

I. Autopsy Photos

Autopsy photographs do not hold the relevance which crime scene photos arguably hold. In general, and in this case specifically, they certainly do not depict the crime scene nor any scene "created by" the perpetrator; they show the body *after* it has been stripped of clothing and even shaved of hair, and the body's appearance is "unnatural" ; they show wounds after examination by the medical examiner and there are often labels or other markings in the photos to clarify measurements. Finally, the photos are cumulative. The medical examiner will testify as to her findings including the cause of death, the size and location of the injury, the path of the bullet, and all other matters probative of the infliction of the wound and results thereof. Furthermore, her report including all such information, identifying information and diagrams of the body and wounds, will be moved into evidence and published to the jury for their consideration. As the defense will stipulate to the identities of the bodies depicted in the photos, the admission of the photos into evidence would constitute an abuse of discretion as they are cumulative, and their probative value falls far short of their prejudicial effect.

II. Crime Scene Photos

The gruesome nature of certain of the crime scene photographs, especially of Linda Franklin, are not probative of any of the enumerated elements. The very fact that the disparity

between the scenes of the Franklin and Meyers shootings, the appearance of the wounds, allegedly inflicted by the same weapon, supports the conclusion that the wounds themselves, the physical results of the .223 bullet are not a product of a specific malice, motive or intent of the shooter. It certainly can not be said that Mr. Meyers' shooting and death are less atrocious than Ms. Franklin's simply because the resulting injury is less gruesome to behold. Logically then, it follows that what is depicted in the photographs beyond the fact of the bullet wound itself, is probative of nothing, and will merely inflame the jury.

III. Conclusion

Introduction at the guilt phase of defendant's capital murder trial of certain of the related crime scene and autopsy photographs is unnecessary to establish any material element of the crimes alleged and that their introduction will only serve to prejudice and inflame the jury against the Defendant as the alleged perpetrator of the subject crime(s). Any relevance their introduction into evidence may have would be clearly outweighed by their obvious prejudicial impact such that their admission would violate the defendant Malvo's basic due process right(s) to a fair trial in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, §11 of the Constitution of the Commonwealth of Virginia.

The aforementioned considered, it is respectfully submitted, that the instant motion should be granted.

Respectfully submitted,
LEE BOYD MALVO

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was mailed, first class to:

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and the original was forwarded for filing to:

Hon. John T. Frey
Clerk of Fairfax County Circuit Court
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and a true copy was forwarded to the:

Hon. Jane Marum Roush
Judge, Fairfax County Circuit Court
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Fairfax, VA 22030

this 14th day of February, 2003.

Co-Counsel

Co-Counsel